UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LOUIS FLORES,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

No. 17 Civ. 36 (JGK)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York
86 Chambers Street, 3rd Floor
New York, New York 10007
Tel.: (212) 637-2774

REBECCA S. TINIO
Assistant United States Attorney
— Of Counsel —

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

RULES

PRELIMINARY STATEMENT

Defendant the United States Department of Justice, by its attorney, Geoffrey S. Berman, United States Attorney for the Southern District of New York, respectfully submits this memorandum in support of its motion for summary judgment in the above-captioned case, which arises under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

This action arises from FOIA requests submitted to the FOIA/Privacy Act Office of the Executive Office of United States Attorneys ("EOUSA FOIA") by Plaintiff Louis Flores. Plaintiff's requests seek the release of various types of records relating to speeches given by former U.S. Attorney Preet Bharara, including records memorializing such speeches, records relating to costs paid by the U.S. Attorney's Office for the Southern District of New York ("SDNY") relating to U.S. Attorney Bharara's travel to make certain speeches, and record retention policies governing U.S. Attorneys. As set forth in detail herein, and in agency declarations in support of this motion, Defendant has met (and, indeed, exceeded) its obligation to conduct reasonable searches for the documents Plaintiff seeks. Moreover, while the agency released numerous documents responsive to Plaintiff's core FOIA requests in full, the agency also properly withheld records or portions of records pursuant to FOIA Exemptions 5 and 6, in order to protect attorney-client privileged information, deliberative process privileged information, and personally identifiable information associated with government personnel and third parties who have not given their consent to the release of that information. Accordingly, the Court should grant Defendant's motion for summary judgment.

FACTUAL BACKGROUND

A. The FOIA Requests and Pre-Suit Administrative Background

On April 25, 2016, Plaintiff sent FOIA requests to EOUSA FOIA, seeking:

a. All records and information pertaining to dates, times, hosts, locations, and other information pertaining to speeches made by U.S. Attorney Bharara since he commenced serving as U.S. Attorney for the Southern District of New York;

b. All records, *complete* recordings in any format whatsoever (either digital or physical), *complete* transcripts, and other information pertaining to the *complete* speeches made by U.S. Attorney Bharara, including any question and answer sessions, since he commenced serving as U.S. Attorney for the Southern District of New York;

c. All records and information pertaining to the costs of paid by the U.S. Attorney's Office for U.S. Attorney Bharara and his staff to travel to and attend the appearances made outside of Manhattan, where U.S. Attorney Bharara has delivered speeches, including, but limited to, air fare, ground transportation, hotel accommodations, meals, entertainment, *per diem* allowances, and all other costs incidental or associated with speeches made by U.S. Attorney Bharara; and

d. All records and information pertaining to the policies, procedures, customs, traditions, guidelines, or other instructions followed by staff of the U.S. Attorney's Office for the Southern District of New York to record in any format whatsoever (either digital or physical), transcribe, and/or preserve any recordings and/or transcriptions of the speeches made by U.S. Attorney Bharara since he commenced serving as U.S. Attorney for the Southern District of New York.

See Declaration of Tricia Francis, dated January 31, 2018 ("EOUSA Dec.") ¶ 4, Attachment A at Page 3 of 6; Declaration of Darian Hodge, dated January 31, 2018 ("SDNY Dec.") ¶ 7. Plaintiff also requested expedited processing of his request and a fee waiver, on the grounds that his request assertedly concerned a matter of public interest, and that he claimed to qualify as a member of the news media. EOUSA Dec. ¶ 5, Attachment A at Page 3 of 6 to Page 6 of 6.

On May 23, 2016, EOUSA FOIA assigned Plaintiff's requests tracking number 2016-02319, notified Plaintiff that his requests had been directed to the "Complex" handling track, and denied as unwarranted Plaintiff's request for expedited processing. *Id.* ¶¶ 6-7, Attachments B, C.

EOUSA FOIA also informed Plaintiff that unless he was granted a fee waiver or reduction, certain costs could be associated with processing his request, namely $40 per hour for search and review after the first two hours, and duplication fees of five cents per page after the first 100 pages. *Id.* ¶ 6, Attachment B. EOUSA FOIA then submitted Plaintiff's requests to the U.S. Attorney's Office for the Southern District of New York ("SDNY") so that searches for responsive records within the SDNY could be conducted. *Id.* ¶ 8; SDNY Dec. ¶ 7. Subsequently, the FOIA point of contact for the SDNY informed EOUSA FOIA that the first two hours of search time had been used, and that 28 more hours of search time would be needed to search for records responsive to Plaintiff's FOIA request. EOUSA Dec. ¶ 9; SDNY Dec. ¶ 9.

On August 15, 2016, EOUSA FOIA, by way of a letter, denied Plaintiff's request for a fee waiver, on the basis that he did not meet all the requirements of the "public interest" standard. EOUSA Dec. ¶ 10, Attachment E. On the same date, EOUSA FOIA issued a fee letter to Plaintiff, in which it assessed a search fee of $1,120.00 for the 28 additional hours of search time that the SDNY FOIA point of contact estimated would be needed to locate records responsive to Plaintiff's FOIA requests. *Id.* ¶ 11, Attachment F.

On November 14, 2016, EOUSA FOIA informed Plaintiff that his FOIA request was being administratively closed, because he did not respond to the August 15, 2016 fee letter, nor did he provide the advance payment assessed by that letter. *Id.* ¶ 12, Attachment G. Plaintiff had, at that point, already appealed EOUSA FOIA's denial of a fee waiver to the Department of Justice's Office of Information Policy ("OIP"). *Id.* ¶ 13, Attachment H. On December 8, 2016, OIP remanded Plaintiff's request for a fee waiver back to EOUSA FOIA for further consideration. *Id.* ¶ 14, Attachment I.

B. The FOIA Complaint and Post-Complaint Searches

On January 3, 2017, Plaintiff filed the present lawsuit, asserting claims under FOIA. Dkt. No. 2.

On April 12, 2017, EOUSA FOIA notified Plaintiff that it had re-assessed his request for a fee waiver and granted the request on public interest grounds, and confirmed that all materials being made available to Plaintiff in response to his FOIA requests would be provided at no charge. EOUSA Dec. ¶ 16, Attachment J. After EOUSA FOIA's grant of the fee waiver, the SDNY FOIA point of contact, along with other members of the SDNY staff, resumed searching for responsive records. *Id*. ¶ 17; SDNY Dec. ¶ 12. Because of the nature of Plaintiff's FOIA requests, virtually all of the responsive records were located in the files and archives of the SDNY. EOUSA Dec. ¶ 17.

To locate records responsive to Plaintiff's requests, the SDNY FOIA point of contact first consulted with the SDNY Press Office, which maintains, among other documents, written documents (*e.g.*, the text of prepared remarks, transcripts, indictments), visual aids (physical demonstratives, .pdf files of demonstratives and other visual aids), and video files relating to press conferences and question and answer sessions conducted by, as relevant to this matter, then-U.S. Attorney Preet Bharara. SDNY Dec. ¶ 13. The SDNY Press Office maintained these documents both in connection with live press conferences and question and answer sessions conducted by U.S. Attorney Bharara, and also because these materials are frequently publicly posted on the SDNY's public website and/or YouTube page. *Id.*; *see* *https://www.justice.gov/usao-sdny/news* ("News" page on SDNY website); https://www.youtube.com/channel/UCr7B9rQ37LYcYAnO4WuLv-Q (homepage for SDNY YouTube channel). The SDNY Press Office provided to the SDNY FOIA point of contact all

records in its possession responsive to Plaintiff's requests. SDNY Dec. ¶ 13. As to the physical demonstratives kept in the SDNY Press Office that were responsive to Plaintiff's requests, SDNY personnel photographed all such demonstratives for the purpose of releasing those photographs to Plaintiff. *Id.*

SDNY personnel undertook additional search efforts in order to locate records potentially responsive to Plaintiff's request. For example, other SDNY personnel contacted EOUSA in order to locate any policies, procedures, customs, traditions, guidelines, or other instructions relating to record retention responsive to Plaintiff's requests that EOUSA provided specifically to U.S. Attorney Bharara, and that were potentially responsive to Plaintiff's requests. *Id.* ¶ 15. In addition, the U.S. Attorney's administrative assistant undertook a search of network drives maintained at the SDNY specifically by or on behalf of U.S. Attorney Bharara during his time as U.S. Attorney, in order to locate additional responsive records relating to U.S. Attorney Bharara's speeches, press conferences, testimony, and question and answer sessions. *Id.* ¶ 16. After potentially responsive materials were gathered, other SDNY personnel subsequently reviewed these records in order to identify, to a reasonable degree of certainty, final versions of the text of prepared remarks or testimony, or transcripts thereof, which U.S. Attorney Bharara gave, for release to Plaintiff. *Id.*

Personnel in the SDNY budget department utilized that department's systems to generate reports setting forth the information sought by Plaintiff's third request (the request for records and information pertaining to the costs paid by the SDNY for U.S. Attorney Bharara and any staff to travel to any appearance made outside Manhattan where U.S. Attorney Bharara gave a speech), for the purpose of providing those reports to the Plaintiff. *Id.* ¶ 17. Finally, the Associate U.S. Attorney for the SDNY undertook additional search efforts in order to locate

records responsive to Plaintiff's requests. *Id.* ¶ 14. The Associate U.S. Attorney serves as the Government Ethics Advisor for the SDNY, and generally vets events where the U.S. Attorney is invited to speak in order to ensure compliance with applicable government ethics rules and other restrictions. *Id.* ¶ 14.a. The Associate U.S. Attorney keeps records related to this function in email and other electronic file formats within his own records at the SDNY. *Id.* In this matter, the Associate U.S. Attorney conducted keyword searches and file name reviews to identify records from his electronic files that were potentially responsive to Plaintiff's requests. *Id.* The Associate U.S. Attorney also searched or caused to be searched the internal Department of Justice network, known as "USANet," in order to locate any responsive policies, procedures, customs, traditions, guidelines, or other instructions relating to record retention by U.S. Attorneys. *Id.* ¶ 12.b.

C. FOIA Responses

Defendant made a first interim release of responsive records to Plaintiff on April 27, 2017, which included, among other things, prepared texts of remarks, visual aids, photographs of demonstratives, and other materials associated with speeches, press conferences, testimony, and other public appearances by U.S. Attorney Bharara, which were responsive to Plaintiff's first and second FOIA requests. EOUSA Dec. ¶ 17, Attachment K. The records that were contained in the first interim release were all released in full. *Id*. The SDNY FOIA point of contact initially sent the first interim release to Plaintiff in a series of nine emails, but in response to Plaintiff's having informed the USAO that he did not receive all the emails, the SDNY FOIA point of contact used a variety of other means to attempt to retransmit this release. SDNY Dec. ¶ 19.

On June 2, 2017, EOUSA FOIA issued a second interim release of records to Plaintiff. EOUSA Dec. ¶ 18, Attachment L. The second interim release of records included, among other

things, an additional copy of the materials that were sent to Plaintiff as part of the first interim release, in order to ensure that he received all released records. EOUSA Dec. ¶ 18; SDNY Dec. ¶ 20. The SDNY FOIA point of contact transmitted the second interim release to Plaintiff via certified mail on both a DVD and a flash (or "thumb") drive, in order to address concerns that Plaintiff expressed about not being able to use DVDs containing the first interim release that had previously been sent to him. SDNY Dec. ¶ 20.

Between on or about June 3 and on or about June 14, 2016, the SDNY FOIA point of contact sent EOUSA FOIA approximately 1,243 pages of potentially responsive records for review and release determinations. EOUSA Dec. ¶ 19. Additional records were also reviewed by various members of the SDNY staff. *Id.* On June 16, 2017, EOUSA issued the third and final release of records responsive to Plaintiff's FOIA requests, in which it released some pages in full and some pages in part, and withheld some pages in full, as well as releasing a number of video files in full. *Id.* ¶ 20, Attachment M. A number of the pages that were withheld in full were determined to be, upon review, non-responsive to Plaintiff's FOIA requests. *Id.* EOUSA FOIA also asserted FOIA Exemptions (b)(5) and (b)(6) as to certain withheld records or portions of records. *Id.*[1] The records or portions of records that were withheld were reviewed to determine if any information could be segregated for release. *Id.* The third and final release of records included, among other things, additional documents that appeared to reflect the final version of the prepared text of remarks given by U.S. Attorney Bharara, transcripts of remarks given by U.S. Attorney Bharara, and videos of remarks and press conferences given by U.S. Attorney Bharara, which were responsive to Plaintiff's first and second FOIA requests; cost

[1] As the EOUSA FOIA declaration explains, EOUSA FOIA initially also asserted FOIA Exemption 7(C) as to certain withheld records or portions of records, but has now withdrawn all assertions of that exemption. *Id.* ¶¶ 20, 27.

reports generated by the SDNY budget department to set forth information responsive to Plaintiff's third FOIA request; records reflecting policies and guidance relating to record retention by U.S. Attorneys, which were responsive to Plaintiff's fourth FOIA request; and, finally, email correspondences and attachments thereto relating to the vetting of possible speeches and appearances by U.S. Attorney Bharara to ensure compliance with governmental ethics rules and other restrictions, which were arguably responsive to Plaintiff's first FOIA request. *Id.* The third and final release of records also included all of the records that had previously been included in the second interim release, to ensure that Plaintiff received all of the released records. SDNY Dec. ¶ 21.

The SDNY FOIA point of contact sent the third and final release of records to Plaintiff via certified mail on an external hard drive, because the third and final release included a number of large video files. *Id*. At Plaintiff's request, SDNY personnel subsequently provided Plaintiff with hard copies of all of the records provided to the Plaintiff in all three releases (except for the video files), and Plaintiff picked up those hard copy records from the SDNY. *Id.*[2]

[2] During the course of the SDNY FOIA point of contact's efforts to search for records responsive to Plaintiff's requests, he created a draft chart for his own internal use, in order to track records located relating to different speeches, remarks, press conferences, and testimony given by then-U.S. Attorney Bharara. SDNY Dec. ¶ 22. The draft chart contained information about the date of the speech, hyperlinks to, where available, documents relating to the speech (for example, a prepared text or transcript), and columns to indicate whether any corresponding demonstrative or video was located. *Id.* The draft chart was, at all times, only an incomplete draft, never in final form, and never intended to be released to Plaintiff, since it was created during the course of this litigation for internal use only. *Id.* Furthermore, the existence of columns and rows in the draft chart was not meant to indicate that a particular type of record actually existed corresponding to a particular speech; for example, the draft chart is not intended to signify that demonstratives or videos actually exist that correspond to each speech or set of remarks given by U.S. Attorney Bharara. *Id.* The draft chart created by the SDNY FOIA point of contact may have been inadvertently included in one of the interim releases of documents to the Plaintiff. *Id.* If the draft chart was, indeed, released to the Plaintiff, that release was in error. *Id.*

During the course of reviewing the interim and final releases of documents in this case, EOUSA FOIA located one document that was erroneously withheld in full, which was released in part by the SDNY to Plaintiff on January 31, 2018. EOUSA Dec. ¶ 21.

ARGUMENT

A. Legal Standards for Summary Judgment in FOIA Actions

The Freedom of Information Act, 5 U.S.C. § 552, represents a balance struck by Congress "'between the right of the public to know and the need of the Government to keep information in confidence.'" *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (quoting H.R. Rep. 89-1497, 89th Cong., 2d Sess. 6 (1966)); *New York Times Co. v. DOJ*, 872 F. Supp. 2d 309, 314 (S.D.N.Y. 2012). Thus, while FOIA requires disclosure under certain circumstances, the statute recognizes "that public disclosure is not always in the public interest," *CIA v. Sims*, 471 U.S. 159, 166-67 (1985), and mandates that records need not be disclosed if "the documents fall within [the] enumerated exemptions," *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7 (2001); *see also Martin v. DOJ*, 488 F.3d 446, 453 (D.C. Cir. 2007) ("Recognizing, however, that the public's right to information was not absolute and that disclosure of certain information may harm legitimate governmental or private interests, Congress created several exemptions to FOIA disclosure requirements."); *John Doe Agency*, 493 U.S. at 152 (FOIA exemptions are "intended to have meaningful reach and application").

Most FOIA actions are resolved by summary judgment. *See, e.g.*, *Carney v. DOJ*, 19 F.3d 807, 812 (2d Cir. 1994); *New York Times Co. v. DOJ*, 915 F. Supp. 2d 508, 531 (S.D.N.Y. 2013). Summary judgment is warranted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In a FOIA case, courts consider two issues to determine whether summary judgment for the defendant

agency is appropriate. First, the court must determine whether the agency has made "reasonable efforts to search for the records" requested by the plaintiff. *See* 5 U.S.C. § 552(a)(3)(C); *see also Carney*, 19 F.3d at 812. Second, if an agency's search locates records responsive to a request, the court determines whether the government has properly withheld records or information under any of FOIA's exemptions. *See* 5 U.S.C. § 552(a)(4)(B). "Affidavits or declarations supplying facts indicating that the agency has conducted a thorough search and giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden." *Carney*, 19 F.3d at 812. Moreover, an agency's declarations in support of its determination are "accorded a presumption of good faith." *Id.*; *see also Halpern v. FBI*, 181 F.3d 279, 295 (2d Cir. 1999); *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 69 (2d Cir. 2009).[3]

In this case, Defendant has submitted detailed declarations, with an accompanying *Vaughn* index[4], thoroughly explaining the searches conducted by the SDNY FOIA point of contact and other SDNY personnel, and also explaining and justifying the bases for Defendant's partial and full withholdings of records pursuant to FOIA Exemptions 5 and 6. Accordingly, the Court should grant Defendant's summary judgment motion in its entirety.

[3] Defendant has not submitted a Local Rule 56.1 statement, as "the general rule in this Circuit is that in FOIA actions, agency affidavits alone will support a grant of summary judgment," and a Local Rule 56.1 statement "would be meaningless." *Ferguson v. FBI*, No. 89 Civ. 5071 (RPP), 1995 WL 329307, at *2 (S.D.N.Y. June 1, 1995), *aff 'd*, 83 F.3d 41 (2d Cir. 1996); *New York Times*, 872 F. Supp. 2d at 314 (noting Local Civil Rule 56.1 statement not required in FOIA actions in this Circuit).

[4] *Vaughn* indices derive from *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), in which the D.C. Circuit held that government agencies withholding information responsive to FOIA requests must justify those withholdings with "adequate specificity" by providing itemized explanations. *Id.* at 826-28.

B. Defendant's Searches Were Reasonable

As established in the detailed declarations provided by EOUSA FOIA and the SDNY FOIA point of contact, the numerous searches conducted for records potentially responsive to Plaintiff's requests were thorough and more than reasonable. Defendant does not have a heavy burden in defending the searches it performed in response to Plaintiff's FOIA requests; Defendant need only show "that its search was adequate." *Long v. Office of Personnel Mgmt.*, 692 F.3d 185, 190 (2d Cir. 2012) (quoting *Carney*, 19 F.3d at 812). "Adequacy" requires the agency to demonstrate that its search was "reasonably calculated to discover the requested documents," not that the search "actually uncovered every document extant"; the search "need not be perfect, but rather need only be reasonable." *Grand Cent. P'ship v. Cuomo*, 166 F.3d 473, 489 (2d Cir. 1999); *see also Adamowicz v. IRS*, 552 F. Supp. 2d 355, 361 (S.D.N.Y. 2008) (an agency must make "a good faith effort to search for the requested documents," but "[t]his standard does not demand perfection, and thus failure to return all responsive documents is not necessarily inconsistent with reasonableness"); *Garcia v. DOJ*, 181 F. Supp. 2d 356, 368 (S.D.N.Y. 2002) ("The agency is not expected to take extraordinary measures to find the requested records, but only to conduct a search reasonably designed to identify and locate responsive documents."); *Meeropol v. Meese*, 790 F.2d 942, 950-51 (D.C. Cir. 1986) ("the issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the *search* for those documents was *adequate*.") (emphasis in original).

The agency is not required to search every record system, but need search only those systems in which it believes responsive records are likely to be located. *See Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 497 (S.D.N.Y. 2010). Where the agency's declarations demonstrate

that it has conducted a reasonable search, "the FOIA requester can rebut the agency's affidavit only by showing that the agency's search was not made in good faith." *Maynard v. CIA*, 986 F.2d 547, 560 (1st Cir. 1993); *see also Carney*, 19 F.3d at 812; *Triestman v. DOJ*, 878 F. Supp. 667, 672 (S.D.N.Y. 1995). "[P]urely speculative claims about the existence and discoverability of other documents" are insufficient to impugn the good faith presumption accorded to an agency declaration. *Carney*, 19 F.3d at 813.

The declaration provided by the SDNY FOIA point of contact establishes that Defendant conducted reasonable searches in response to Plaintiff's four categories of FOIA requests. First, Defendant searched the record systems and locations, or caused the record systems and locations to be searched, where it believed responsive records were likely to be located. *See* SDNY Dec. ¶ 18 (attesting that "there are no other locations in the USAO-SDNY where any other records might be located and responsive to the Plaintiff's request. I am not aware of any other method or means by which a further search could be conducted and produce additional responsive records."); *see also Amnesty Int'l USA*, 728 F. Supp. 2d at 497. As to Plaintiff's first and second requests for records and information, including recordings and transcripts, relating to speeches made by former U.S. Attorney Bharara, the SDNY FOIA point of contact and other SDNY personnel searched multiple locations within the SDNY where such records were likely to be found: the SDNY Press Office, which maintained those records in connection with live U.S. Attorney press conferences and for posting to the public SDNY web pages, and SDNY network folders maintained by or on behalf of U.S. Attorney Bharara himself, to locate U.S. Attorney Bharara's own records relating to speeches, remarks, or testimony. SDNY Dec. ¶¶ 13, 16. Indeed, Defendant released numerous videos, transcripts, texts of prepared remarks, visual aids,

and photographs of physical demonstratives, used at or associated with U.S. Attorney Bharara's speeches and public appearances. EOUSA Dec. ¶¶ 17, 20.

With respect to Plaintiff's third request, for records and information relating to the costs paid by the SDNY for U.S. Attorney Bharara and SDNY staff to travel to appearances made outside Manhattan where U.S. Attorney Bharara spoke, personnel in the SDNY budget office generated cost reports reflecting responsive information, which were released to Plaintiff. SDNY Dec. ¶ 17; EOUSA Dec. ¶ 20. As to Plaintiff's fourth request, for policies, guidances, and similar documents relating to record retention by U.S. Attorneys, Defendant undertook two searches: first, requesting from EOUSA any relevant documents that EOUSA provided directly to U.S. Attorney Bharara relating to records retention, and second, searching the internal DOJ network known as USANet for relevant U.S. Attorney Policies and Procedures. SDNY Dec. ¶¶ 14.b, 15. Indeed, responsive records were found at these locations and released to Plaintiff. EOUSA Dec. ¶ 20; *see also id.*, Attachment N (*Vaughn* index), entries for Documents 144 and 145.

Finally, out of an abundance of caution and arising from a broad reading of Plaintiff's FOIA requests, SDNY personnel conducted searches in email archives and network folders maintained by the SDNY Associate U.S. Attorney, who, among other duties, performs vetting of requests and invitations extended to the U.S. Attorney to speak at outside events in order to ensure compliance with government ethics rules and other restrictions; provides legal advice to the U.S. Attorney regarding such issues; and sometimes seeks legal advice from the EOUSA Office of General Counsel ("EOUSA OGC") relating to the U.S. Attorney's participation in such outside events. SDNY Dec. ¶¶ 14.a, 14.c. As a result of these searches, Defendant located and processed numerous email correspondences (and attachments thereto) between the SDNY

Associate U.S. Attorney and EOUSA OGC, between the SDNY Associate U.S. Attorney and other SDNY staff including U.S. Attorney Bharara, or between the SDNY Associate U.S. Attorney and third parties, relating to invitations to U.S. Attorney Bharara to speak at or attend outside events. EOUSA Dec. ¶ 20. Some of these documents were released in full, but some were withheld in full or in part due to the application of FOIA exemptions. EOUSA Dec. ¶ 20; *see also generally Vaughn* index (indicating withholdings pursuant to FOIA exemptions from these categories of email correspondences).

Defendant's declarations show that each of these searches was conducted reasonably and in good faith. Indeed, the search of the SDNY Associate U.S. Attorney's records, in particular, shows that Defendant read Plaintiff's FOIA requests broadly and searched for, and released, records that were arguably not clearly called for by Plaintiff's FOIA requests. Defendant's efforts to locate responsive records in multiple locations more than satisfied FOIA's requirement to conduct adequate, reasonable searches.

C. Defendant Properly Applied FOIA's Exemptions

The EOUSA FOIA declaration also establishes that Defendant properly withheld documents in part and in full pursuant to FOIA Exemptions 5 and 6.

It is important to note, first, that nearly all of the core documents requested by Plaintiff were released in full or with only minimal withholdings. In particular, all records reflecting actual speeches, press conferences, question and answer sessions, testimony, or similar appearances by former U.S. Attorney Bharara—including the texts of prepared remarks, transcripts, visual aids, relevant legal documents, photographs of physical demonstratives used during presentations, and videos of speeches or appearances—were released *in full*. *See* EOUSA Dec. ¶¶ 17, 20. Records released in response to Plaintiff's third and fourth FOIA requests,

relating to costs paid by the SDNY and policies governing record retention, were released either in full or with minimal withholding solely of certain limited personally identifying information, which will be discussed further below. *See* EOUSA Dec. ¶ 20; *see also Vaughn* index, entries for Documents 144-46 (reflecting that only personally identifying information was withheld from one cost report and from two record retention policy documents). Therefore, nearly all of the core records that Plaintiff requested were released to him in full.

As explained further below, the bulk of the information withheld from records processed in response to Plaintiff's FOIA requests was withheld from the email correspondences and attachments thereto located in the SDNY Associate U.S. Attorney's files, reflecting communications between the SDNY Associate U.S. Attorney, on the one hand, and EOUSA OGC, other SDNY staff (including U.S. Attorney Bharara), or third parties, relating to invitations to the U.S. Attorney to speak at or attend outside events, and the process of vetting those invitations in order to comply with government ethics rules and other restrictions. *See* SDNY Dec. ¶¶ 14.a, 14.c; EOUSA Dec. ¶¶ 20, 24-30; *Vaughn* index, entries for Documents 1-143, 147-221.

a. Defendant Properly Withheld Privileged Information Pursuant to Exemption 5

FOIA's fifth exemption protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). "By this language, Congress intended to incorporate into the FOIA all the normal civil discovery privileges." *Hopkins v. HUD*, 929 F.2d 81, 84 (2d Cir. 1991). "Stated simply, agency documents which would not be obtainable by a private litigant in an action against the agency under normal discovery rules . . . are protected from disclosure

under Exemption 5." *Tigue v. DOJ*, 312 F.3d 70, 76 (2d Cir. 2002) (quoting *Grand Cent. P'ship*, 166 F.3d at 481).

Among other privileges, Exemption 5 incorporates the attorney-client privilege. *See In re Grand Jury Investigation*, 399 F.3d 527, 533 (2d Cir. 2005). "The attorney-client privilege protects confidential communications from clients to their attorneys made for the purpose of securing legal advice or services." *Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997). The purpose of the privilege "is to encourage attorneys and their clients to communicate fully and frankly and thereby to promote broader public interests in the observance of law and administration of justice." *In re Country of Erie*, 473 F.3d 413, 418 (2d Cir. 2007) (citation and internal quotation marks omitted). "In the governmental context, the 'client' may be the agency and the attorney may be an agency lawyer." *Tax Analysts*, 117 F.3d at 618. Indeed, "the traditional rationale for the [attorney-client] privilege applies with special force in the government context. It is crucial that government officials, who are expected to uphold and execute the law . . . be encouraged to seek out and receive fully informed legal advice." *County of Erie*, 473 F.3d at 419 (quoting *In re Grand Jury Investigation*, 399 F.3d at 534).

Exemption 5 also incorporates the "'deliberative process' or 'executive' privilege, which protects the decisionmaking processes of the executive branch in order to safeguard the quality and integrity of governmental decisions." *Hopkins*, 929 F.2d at 84; *accord NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-51 (1975) ("those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decision making process" (quotation marks omitted)). Legal advice, like other advisory opinions, "fits exactly within the deliberative process rationale for Exemption 5." *Brinton v. Dep't of State*, 636 F.2d 600, 604 (D.C. Cir. 1980).

An agency record must satisfy two criteria to qualify for the deliberative process privilege: it "must be both 'predecisional' and 'deliberative.'" *Grand Cent. P'ship*, 166 F.3d at 482 (citations omitted). A document is "predecisional" when it is "prepared in order to assist an agency decisionmaker in arriving at his decision." *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975). The government need not "identify a specific decision" made by the agency to establish the predecisional nature of a particular record, *Sears*, 421 U.S. at 151 n.18; *accord Tigue*, 312 F.3d at 80. So long as the document "was prepared to assist [agency] decisionmaking on a specific issue," it is predecisional. *Id*.

"A document is 'deliberative' when it is actually related to the process by which policies are formulated." *Grand Cent. P'ship*, 166 F.3d at 482 (quotation marks and alteration omitted). In determining whether a document is deliberative, courts inquire whether it "formed an important, if not essential, link in [the agency's] consultative process," whether it reflects the opinions of the author rather than the policy of the agency, and whether it might "reflect inaccurately upon or prematurely disclose the views of [the agency]." *Id.* at 483; *accord Hopkins*, 929 F.2d at 84. The privilege "focus[es] on documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *Hopkins*, 929 F.2d at 84-85 (quoting *Sears*, 421 U.S. at 150).

As the EOUSA FOIA Declaration explains, Exemption 5 was applied to certain records that "contained attorney-client privileged information" or "demonstrated the deliberative process of members of staff at the USAO-SDNY and EOUSA's OGC, when ethical questions relating to the U.S. Attorney's attendance at an event were raised, reviewed, and discussed for the purpose of advising the U.S. Attorney about ethical issues relating" to such events, "and then finally

resolved." EOUSA Dec. ¶ 24; *see generally Vaughn* index. "[S]uch records reflect matters such as confidential communications between and among attorneys and professional responsibility officers at the District and EOUSA's OGC made for the purpose of obtaining or providing legal advice retarding ethical obligations and rules, as well as pre-decisional deliberations regarding the legal issues they were assessing and discussing . . . Disclosure of this information would represent an intrusion into the attorney-client relationship, impeding the government's efforts to obtain and utilize full and frank legal advice to ensure its observance of the law. . . . . Disclosure would [also] jeopardize the candid and comprehensive considerations essential for efficient and effective agency decision-making." EOUSA Dec. ¶¶ 24-25.

In this case, confidential discussions between the SDNY Associate U.S. Attorney and U.S. Attorney Bharara, or between the SDNY Associate U.S. Attorney and attorneys at EOUSA OGC, conducted for the purpose of seeking or providing legal advice regarding ethical issues associated with the U.S. Attorney's participation in outside events, are by their very nature attorney-client privileged, as well as frequently predecisional and deliberative. Records containing such discussions reflect advice, the preparation of advice, and other deliberations by government attorneys for the purpose of advising the U.S. Attorney as to compliance with government ethics rules and other restrictions. Compelled disclosure of this information would undermine the deliberative processes of the government and chill the candid and frank attorney-client communications necessary for effective governmental decision-making. *Id.* For these reasons, Defendant properly applied Exemption 5 to email correspondences and, where appropriate, attachments thereto, relating to the discussion of legal issues associated with U.S. Attorney Bharara's participation in outside events as a speaker. *See generally Vaughn* index.

b. Defendant Properly Withheld Personally Identifiable Information of Government Personnel and Third Parties Pursuant to Exemption 6

Defendant also properly withheld portions of released documents pursuant to FOIA Exemption 6. As explained more fully below, Exemption 6 balances individuals' privacy interests in protecting information from disclosure against the public interest in that particular disclosure.

Exemption 6 exempts from disclosure information from personnel, medical, or other similar files, the disclosure of which "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982). The courts have "adopted a broad construction of 'similar files,' holding that the term applies to any detailed information in government files about a particular individual from which the identity of the individual can be discerned." *Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec.*, Civ. 04-1625 (PLF), 2006 WL 6870435, at *9 (D.D.C. Dec. 22, 2006) (upholding redaction of CBP and DHS employee names in emails under Exemption 6) (citing *Washington Post Co.*, 456 U.S. at 602); *see also Cook v. Nat'l Archives & Records Admin.*, 758 F.3d 168, 175 (2d Cir. 2014) ("a record is a 'similar file' if it contains personal information identifiable to a particular person"); *Long*, 692 F.3d at 195 ("[P]rivacy interests protected by the exemptions to FOIA are broadly construed.") (quoting *Associated Press v. DOJ*, 549 F.3d 62, 65 (2d Cir. 2008)); *Amnesty Int'l USA v. CIA*, 07 Civ. 5435 (LAP), 2008 WL 2519908, at *16 (S.D.N.Y. June 19, 2008) (upholding redaction of name, fax number, and address from email pursuant to Exemption 6). The privacy interest in Exemption 6 "belongs to the individual, not the agency." *Amuso v. DOJ*, 600 F. Supp. 2d 78, 93 (D.D.C. 2009).

In determining whether personal information is exempt from disclosure under Exemption 6, the Court must next balance the public's need for this information against the individual's privacy interest. *See Wood v. FBI*, 432 F.3d 78, 86 (2d Cir. 2005). "The privacy side of the balancing test is broad and 'encompasses all interests involving the individual's control of information concerning his or her person.'" *Id.* at 88 (quoting *Hopkins*, 929 F.2d at 87). Moreover, because "[t]he privacy interests protected by the exemptions to FOIA are broadly construed," *Associated Press*, 549 F.3d at 65, even a small privacy interest triggers a balancing analysis. *See Associated Press v. DOD*, 554 F.3d 274, 285 (2d Cir. 2009); *Long*, 692 F.3d at 191 ("[T]he bar is low: 'FOIA requires only a measurable interest in privacy to trigger the application of the disclosure balancing tests.'"). On the other hand, the "only relevant public interest in disclosure to be weighed in this balance is the extent to which disclosure would serve the core purpose of the FOIA, which is contribut[ing] *significantly* to public understanding *of the operations or activities of the government*." *DOD v. FLRA*, 510 U.S. 487, 495 (1994) (first emphasis added; citation and internal quotation marks omitted); *see also Hopkins*, 929 F.2d at 88. "The requesting party bears the burden of establishing that disclosure of personal information would serve a public interest cognizable under FOIA." *Associated Press*, 549 F.3d at 66. This purpose is not furthered by disclosure of information that "reveals little or nothing about an agency's own conduct." *DOJ v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 773 (1989).

In this case, the agency withheld the following types of information pursuant to Exemption 6: personally identifiable information relating to government personnel at the SDNY and EOUSA, and relating to third parties, including names (excepting former U.S. Attorney Bharara and other similarly prominent public figures), signatures, physical addresses, email

addresses, telephone numbers, and identifying numbers (including tax ID numbers). *See* EOUSA Dec. ¶¶ 27-29; *see generally Vaughn* index, entries for Documents 1-143, 147-221. In its declaration, EOUSA FOIA explains its determination that these withholdings are warranted to protect the privacy of government personnel and third-party individuals (none of whom have consented to the disclosure of this information) against "clearly unwanted, unwarranted, and even unlawful efforts to gain additional access to these individuals and/or personal information about them, or cause them harassment, harm, or exposure to unwanted and/or derogatory publicity, all to their detriment." EOUSA Dec. ¶ 28.

Federal courts recognize that individuals have a significant privacy interest in their personally identifiable information. *See, e.g.*, *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 152 (D.C. Cir. 2006) (Exemption 6 applies not only to files about an individual, "but also bits of personal information, such as names and addresses, the release of which would create a palpable threat to privacy") (internal quotation marks and alteration omitted); *Associated Press*, 554 F.3d at 285 ("It is well established that identifying information such as names, addresses, and other personal information falls within the ambit of privacy concerns under FOIA" (citing cases)). On the other side of the balancing analysis, the revelation of personally identifiable information about government personnel or third parties who are not public figures tells citizens nothing about "what their government is up to," *Reporters Comm.*, 489 U.S. at 773, and therefore there is little to no public interest in its disclosure. The release of the personally identifiable information withheld in this case would not contribute "significantly to public understanding of the operations or activities of the government," which is the "only relevant public interest in disclosure to be weighed in this balance." *FLRA*, 510 U.S. at 495. Because the balancing

analysis tilts heavily in this case towards protecting personally identifiable information from disclosure, Defendant properly withheld the information pursuant to Exemption 6.

c. Defendant Has Produced Any Reasonably Segregable Portions of the Responsive Records

FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). This provision does not require disclosure of records in which the non-exempt information that remains is meaningless. *See Nat'l Sec. Archive Fund, Inc. v. CIA*, 402 F. Supp. 2d 211, 220-21 (D.D.C. 2005) (concluding that no reasonably segregable information exists because "release of the non-exempt information would produce only incomplete, fragmented, unintelligible sentences composed of isolated, meaningless words").

As set forth in the EOUSA FOIA declaration, the agency reviewed the withheld material and disclosed all non-exempt information that reasonably could be segregated and disclosed. *See* EOUSA Dec. ¶ 32. Accordingly, the agency has produced all "reasonably segregable portion[s]" of the responsive records. 5 U.S.C. § 552(b).

d. Plaintiff Is Not Entitled to the Release of Nonresponsive Records

In the course of reviewing records in connection with preparing the third and final release, EOUSA FOIA located a number of nonresponsive documents, which it withheld in full. EOUSA Dec. ¶ 20. No authority entitles Plaintiff to receive documents outside the scope of his requests. *See, e.g.*, *Conti v. DHS*, No. 12 Civ. 5827 (AT), 2014 WL 1274517, at *26-27 (S.D.N.Y. Mar. 24, 2014) ("Plaintiff is not entitled to documents outside the scope of his request."). Therefore, Defendant properly withheld these nonresponsive documents.

D. Plaintiff Is Not Entitled to Other Relief Sought in the Complaint

Finally, the Complaint seeks certain relief to which Plaintiff is not entitled, Dkt. No. 2 at 13, because the relief is premature and/or unavailable under FOIA, or because Plaintiff has not shown and cannot show that such relief is warranted in this matter. For example, Plaintiff's request for "reasonable attorneys' fees and other litigation costs" need not be entertained now, but only when and if Plaintiff is able to demonstrate that he has "substantially prevailed" in this matter. Dkt. No. 2 at 13; 5 U.S.C. ¶ 552(a)(4)(E)(i) (setting forth the "substantially prevailed" standard).[5] Moreover, Plaintiff cannot recover monetary sanctions or penalties against Defendant in this matter, as those remedies are not available in FOIA actions, nor can Plaintiff demonstrate that Defendant has acted in bad faith at any point during the administrative or litigation stages of this proceeding, such that sanctions would be warranted. *See generally*, 5 U.S.C. § 552; *see also Flores v. DOJ*, No. 15-CV-2627 (JMA), 2016 WL 7856423, at *15 n.20 (E.D.N.Y. Oct. 4, 2016). Finally, Plaintiff is not entitled to declaratory or injunctive relief relating to his contention, pled inadequately and in conclusory fashion, that Defendant's "policies, patterns, and practice" violate FOIA. Dkt. No. 2 at 13. This circuit has not recognized a pattern or practice claim in the FOIA context, nor has it articulated a relevant inquiry or test for such a claim. *See Pietrangelo v. U.S. Army*, 334 F. Appx. 358, 359-60 (2d Cir. 2009). In any event, Plaintiff has not adequately pled, and cannot establish, facts that would support such a pattern or practice claim in this case.

[5] Furthermore, it is well established that a *pro se* FOIA plaintiff cannot recover attorney's fees. *See, e.g.*, *Loglia v. IRS*, No. 96 Civ. 2654 (LAK) (RLE), 1997 WL 214869, at *3 (S.D.N.Y. Apr. 25, 1997).

CONCLUSION

For the reasons stated herein, Defendant's motion for summary judgment should be granted.

Dated: New York, New York
January 31, 2018

Respectfully submitted,

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York

By: */s/ Rebecca S. Tinio*
REBECCA S. TINIO
Assistant United States Attorney
86 Chambers Street, 3rd Floor
New York, New York 10007
Telephone: (212) 637-2774
Facsimile: (212) 637-2702
rebecca.tinio@usdoj.gov